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10 Attorneys for Defendant,
LIBERTY MUTUAL FIRE INSURANCE
11 COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

15 LARGO CONCRETE, INC., a
16 California Corporation; N.M.N.
17 CONSTRUCTION, INC., a California
Corporation..

18 Plaintiffs,

19

20 LIBERTY MUTUAL FIRE
INSURANCE COMPANY, a
21 Massachusetts Corporation, and DOES
1 through 100, inclusive..

Defendants.

Case No. C07-04651 CRB (ADR)

The Hon. Charles R. Breyer

[Complaint Filed: September 10, 2007]

**DEFENDANT LIBERTY MUTUAL
FIRE INSURANCE COMPANY'S
ANSWER TO PLAINTIFFS'
COMPLAINT**

25 Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual"),
26 appearing for itself alone, hereby answers the Complaint filed by plaintiffs Largo
27 Concrete, Inc. and N.M.N. Construction, Inc. ("Plaintiffs"), and admits, denies and
28 alleges as follows:

ANSWER TO JURISDICTION ALLEGATIONS

1. Answering paragraph 1 of the Complaint, Liberty Mutual admits the allegations contained in that paragraph.

2. Answering paragraph 2 of the Complaint, Liberty Mutual denies the allegation that "the contracts which are the subject of this action were entered into in the County of Santa Clara, California," and otherwise admits the allegations contained in that paragraph.

ANSWER TO GENERAL ALLEGATIONS

3. Answering paragraph 3 of the Complaint, Liberty Mutual lacks knowledge or information sufficient to form a belief as to those allegations, and on that basis, denies those allegations.

4. Answering paragraph 4 of the Complaint, Liberty Mutual lacks knowledge or information sufficient to form a belief as to those allegations, and on that basis, denies those allegations.

5. Answering paragraph 5 [misnumbered "4"] of the Complaint, Liberty Mutual denies that it is currently a Massachusetts corporation. Liberty Mutual admits that it transacts workers' compensation insurance business in numerous states, including California. Except as so admitted, Liberty Mutual denies the allegations of paragraph 5.

6. Answering paragraph 6 [misnumbered "5"] of the Complaint, Liberty Mutual admits that it issued three workers' compensation insurance policies to Largo Concrete, Inc. ("Largo") for the policy periods October 1, 2002 to October 1, 2003, October 1, 2003 to October 1, 2004, and October 1, 2004 to October 1, 2005. Except as so admitted, Liberty Mutual denies the allegations of paragraph 6.

7. Answering paragraph 7 [misnumbered "6"] of the Complaint, Liberty Mutual admits that Plaintiffs purport to attach to the Complaint copies of the

1 three workers' compensation insurance policies that Liberty Mutual issued to Largo.
2 Except as so admitted, Liberty Mutual denies the allegations of paragraph 7.

3 8. Answering paragraph 8 [misnumbered "7"] of the Complaint,
4 Liberty Mutual states that the terms of the policies issued by Liberty Mutual to
5 Largo speak for themselves. Liberty Mutual admits that Largo posted a letter of
6 credit as collateral for its obligations to Liberty Mutual under the policies issued to
7 Largo. Except as so admitted, Liberty Mutual denies the allegations of paragraph 8.

8 9. Answering paragraph 9 [misnumbered "8"] of the Complaint,
9 Liberty Mutual admits that it issued a workers' compensation insurance policy to
10 N.M.N. Construction, Inc. ("N.M.N.") for the policy period October 1, 2003 to
11 October 1, 2004. Except as so admitted, Liberty Mutual denies the remaining
12 allegations of paragraph 9.

13 10. Answering paragraph 10 [misnumbered "9"] of the Complaint,
14 Liberty Mutual lacks knowledge or information sufficient to form a belief as to what
15 purportedly "induced" Plaintiffs to procure workers' compensation insurance
16 policies from Liberty Mutual, and on that basis, denies those allegations. Liberty
17 Mutual denies the remaining allegations of paragraph 10.

18 11. Answering paragraph 11 [misnumbered "10"] of the Complaint,
19 Liberty Mutual lacks knowledge or information sufficient to form a belief as to
20 those allegations, and on that basis, denies those allegations.

21 12. Answering paragraph 12 [misnumbered "11"] of the Complaint,
22 Liberty Mutual denies the allegations contained in that paragraph.

23 13. Answering paragraph 13 [misnumbered "12"] of the Complaint,
24 Liberty Mutual denies the allegations contained in that paragraph.

25 14. Answering paragraph 14 [misnumbered "13"] of the Complaint,
26 Liberty Mutual denies the allegations contained in that paragraph.

27 15. Answering paragraph 15 [misnumbered "14"] of the Complaint,
28 Liberty Mutual denies the allegations contained in that paragraph.

1 16. Answering paragraph 16 [misnumbered "15"] of the Complaint,
2 Liberty Mutual states that the legal duties and relationship between Liberty Mutual
3 and Plaintiffs are governed by the policies issued to those entities as well as
4 applicable statutes and case law. Liberty Mutual denies the remaining allegations of
5 paragraph 16.

6 17. Answering paragraph 17 [misnumbered "16"] of the Complaint,
7 Liberty Mutual denies the allegations contained in that paragraph.

8 18. Answering paragraph 18 [misnumbered "17"] of the Complaint,
9 Liberty Mutual denies the allegations contained in that paragraph.

10 19. Answering paragraph 19 [misnumbered "18"] of the Complaint,
11 Liberty Mutual lacks knowledge or information sufficient to form a belief as to
12 allegations contained therein relating to Plaintiffs' purported "concerns" and
13 investigation. Liberty Mutual denies the remaining allegations of paragraph 19.

14 20. Answering paragraph 20 [misnumbered "19"] of the Complaint,
15 Liberty Mutual denies the allegations contained in that paragraph.

16 21. Answering paragraph 21 [misnumbered "20"] of the Complaint,
17 Liberty Mutual denies the allegations contained in that paragraph.

18 22. Answering paragraph 22 [misnumbered "21"] of the Complaint,
19 Liberty Mutual denies the allegations contained in that paragraph.

21 **ANSWER TO FIRST CAUSE OF ACTION**

22 23. Answering paragraph 23 [misnumbered "22"] of the Complaint,
23 Liberty Mutual repeats its response in paragraphs 1 through 22, above.

24 24. Answering paragraph 24 [misnumbered "23"] of the Complaint,
25 Liberty Mutual denies the allegations contained in that paragraph.

26 25. Answering paragraph 25 [misnumbered "24"] of the Complaint,
27 Liberty Mutual denies the allegations contained in that paragraph.

1 26. Answering paragraph 26 [misnumbered "25"] of the Complaint,
2 Liberty Mutual denies the allegations contained in that paragraph.

3 27. Answering paragraph 27 [misnumbered "26"] of the Complaint,
4 Liberty Mutual denies the allegations contained in that paragraph.

ANSWER TO SECOND CAUSE OF ACTION

7 28. Answering paragraph 28 [misnumbered "27"] of the Complaint,
8 Liberty Mutual repeats its response in paragraphs 1 through 27, above.

9 29. Answering paragraph 29 [misnumbered "28"] of the Complaint,
10 Liberty Mutual denies the allegations contained in that paragraph.

11 30. Answering paragraph 30 [misnumbered "29"] of the Complaint,
12 Liberty Mutual denies the allegations contained in that paragraph.

13 31. Answering paragraph 31 [misnumbered "30"] of the Complaint,
14 Liberty Mutual lacks knowledge or information sufficient to form a belief as to the
15 truth of the allegations contained therein relating to the actions of Plaintiffs and their
16 "concerns," and on that basis, denies those allegations. Liberty Mutual denies the
17 remaining allegations of paragraph 31.

18 32. Answering paragraph 32 [misnumbered "31"] of the Complaint,
19 Liberty Mutual denies the allegations contained in that paragraph.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Statute of Limitations)

25 33. The Complaint, and each and every purported claim for relief
26 contained therein, is barred to the extent that it seeks relief based on conduct
27 occurring outside of the applicable contractual and non-contractual statutes of

1 limitations, including but not limited to, California Code of Civil Procedure Sections
2 337, 338, 339, 340, and 343.

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4 **SECOND AFFIRMATIVE DEFENSE**

5 (Comparative Fault of Plaintiffs)

6 34. To the extent the Complaint, and each and every purported claim
7 for relief contained therein, alleges that Plaintiffs suffered any purported injury or
8 damages, such injury and damages were caused by Plaintiffs' own negligence or
9 fault, and Plaintiffs' negligence or fault proximately and concurrently caused and
10 contributed to Plaintiffs' alleged damages, if any. Accordingly, Plaintiffs' recovery
11 of its alleged damages, if any, is barred or reduced by Plaintiffs' negligence and fault
12 under the doctrine of comparative fault.

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14 **THIRD AFFIRMATIVE DEFENSE**

15 (Comparative Fault of Third Parties)

16 35. To the extent the Complaint, and each and every purported claim
17 for relief contained therein, alleges that Plaintiffs suffered any purported injury or
18 damages, Liberty Mutual is informed and believes and based thereon alleges that
19 such injury and damages, if any, were caused by the negligence and fault of persons
20 and entities other than Liberty Mutual. Plaintiffs' damages, if any, should be
21 reduced to the extent the negligence and fault of the persons and entities other than
22 Liberty Mutual contributed to Plaintiffs' purported damages.

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24 **FOURTH AFFIRMATIVE DEFENSE**

25 (Failure to Mitigate Damages)

26 36. To the extent the Complaint, and each and every purported claim
27 for relief contained therein, alleges that Plaintiffs suffered any purported injury or
28 damages, Liberty Mutual is informed and believes and based thereon alleges that

1 Plaintiffs have failed to take any and all reasonable or necessary actions to avoid or
2 reduce their damages, and any damages awarded to Plaintiffs, if any, must be
3 reduced accordingly.

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5 **FIFTH AFFIRMATIVE DEFENSE**

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(Right to Offset)

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8 37. Liberty Mutual is entitled to offset any amounts owed by
Plaintiffs to Liberty Mutual against any recovery by Plaintiffs, if any, in this action.

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SIXTH AFFIRMATIVE DEFENSE

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(Waiver of Right to Jury Trial)

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13 38. Plaintiffs have waived any right to a trial by jury of the claims
for relief asserted in the Complaint pursuant to an Agreement for Guarantee of
14 Financial Obligations wherein Plaintiffs agreed that any action or proceeding to
15 enforce or defend any rights under any agreement shall be tried before a court and
16 not before a jury.

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SEVENTH AFFIRMATIVE DEFENSE

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(Punitive Damages – Failure to State a Claim)

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21 39. Liberty Mutual is informed and believes, and upon that basis
alleges, that the Complaint, and each and every alleged claim for relief contained
22 therein, fails to allege facts sufficient to allow the recovery of punitive or exemplary
23 damages from Liberty Mutual.

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EIGHTH AFFIRMATIVE DEFENSE

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(Punitive Damages – Procedural Due Process)

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28 40. Liberty Mutual is informed and believes, and upon that basis
alleges, that to the extent Plaintiffs' Complaint seeks punitive or exemplary damages

1 against Liberty Mutual, it violates the rights of Liberty Mutual to procedural due
2 process under the Fourteenth Amendment of the Constitution of the United States
3 and/or Section 7 of Article I of the constitution of the State of California, and
4 therefore fails to state a claim for relief upon which punitive damages may be
5 awarded.

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7 **NINTH AFFIRMATIVE DEFENSE**

8 (Punitive Damages – Protection from Excessive Fines)

9 41. Liberty Mutual is informed and believes, and upon that basis
10 alleges, that to the extent Plaintiffs' Complaint seeks punitive or exemplary damages
11 against Liberty Mutual it violates the rights of Liberty Mutual to protection from
12 "excessive fines" as provided in the Eighth Amendment of the United State
13 Constitution, and Article I, Section 17 of the Constitution of the State of California,
14 and violates the rights of Liberty Mutual to substantive due process as provided in
15 the Fifth and Fourteenth Amendments to the United States Constitution, and in the
16 California Constitution, and therefore fails to state a claim for relief upon which
17 punitive or exemplary damages may be awarded.

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19 **TENTH AFFIRMATIVE DEFENSE**

20 (Punitive Damages – No Ratification)

21 42. Liberty Mutual is informed and believes, and upon that basis
22 alleges, that at no time relevant to this litigation did Liberty Mutual ratify or approve
23 any alleged malicious, fraudulent or oppressive acts of any of its employees or
24 agents, and that Plaintiffs' request for punitive damages is therefore barred as a
25 matter of law.

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1 WHEREFORE, Liberty Mutual prays for relief as follows:
2

3 1. That Plaintiffs take nothing by reason of their Complaint;
4 2. That Liberty Mutual be awarded its reasonable costs incurred
5 herein; and
6 3. That Liberty Mutual be awarded such other and further relief as
7 this Court deems just and proper.

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9 Dated: October 3, 2007

10 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

11 By _____
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13 FRANK FALZETTA

14 Attorneys for Defendant
15 LIBERTY MUTUAL FIRE
16 INSURANCE COMPANY

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1 PROOF OF SERVICE2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES3 I am employed in the County of Los Angeles; I am over the age of eighteen
4 years and not a party to the within entitled action; my business address is 333 South Hope
5 Street, 48th Floor, Los Angeles, California 90071-1448.6 On **October 3, 2007**, I served the following document(s) described as
7 **DEFENDANT LIBERTY MUTUAL FIRE INSURANCE COMPANY'S ANSWER**
8 **TO PLAINTIFFS' COMPLAINT** on the interested party(ies) in this action by placing
9 true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:10 Nicholas P. Roxborough, Esq.
11 Michael L. Phillips, Esq.
12 Roxborough, Pomerance & Nye LLP
13 5820 Canoga Ave., Suite 250
14 Woodland Hills, CA 9136715 **BY MAIL:** I am "readily familiar" with the firm's practice of collection and
16 processing correspondence for mailing. Under that practice it would be deposited
17 with the U.S. postal service on that same day with postage thereon fully prepaid at
18 Los Angeles, California in the ordinary course of business. I am aware that on
19 motion of the party served, service is presumed invalid if postal cancellation date or
20 postage meter date is more than one day after date of deposit for mailing in
21 affidavit.22 **BY OVERNIGHT DELIVERY:** I served such envelope or package to be
23 delivered on the same day to an authorized courier or driver authorized by the
24 overnight service carrier to receive documents, in an envelope or package
25 designated by the overnight service carrier.26 **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile
27 pursuant to Rule 2.306 of the California Rules of Court. The telephone number of
28 the sending facsimile machine was 213-620-1398. The name(s) and facsimile
29 machine telephone number(s) of the person(s) served are set forth in the service list.
30 The sending facsimile machine (or the machine used to forward the facsimile)
31 issued a transmission report confirming that the transmission was complete and
32 without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this
33 declaration.34 **FEDERAL:** I declare that I am employed in the office of a member of the bar of
35 this Court at whose direction the service was made. I declare under penalty of
36 perjury under the laws of the United States of America that the foregoing is true and
37 correct.38 Executed on **October 3, 2007**, at Los Angeles, California.39 
40 ANDREA J. HERNANDEZ